

SUPREME COURT OF INDIA

Ganga Devi

Vs.

Distt. Judge, Nainital

C.A.No.....of 2008

(S.B. Sinha and Lokeshwar Singh Panta JJ.)

13.05.2008

JUDGMENT

S.B. Sinha, J.

1. Leave granted.

2. This appeal is directed against a judgment and order dated 20.11.2006 passed by the High Court of Uttranchal at Nainital in Writ Petition No. 581 of 2005 affirming the judgment and order dated 4.6.2005 passed by the District Judge, Nainital allowing an appeal from a judgment and order dated 22.11.2004 whereby and whereunder an application for release filed by the respondent on the ground of his bona fide requirement was dismissed.

3. Respondents 1 and 2 are the joint owners of a shop situated in H.No. 110 Durga Cottage Annexy Safak Suffock Hall Compound, Tallital, Nainital.

“Khyali Ram, the husband of the appellant, was a tenant therein. He died leaving behind the appellant (his wife) and two daughters Smt. Hema Tiwari and Smt. Deepa Joshi. They are married. They have no concern with the shop in question.

Respondent No. 3 was in military service. He retired from army. He was living at Nainital with his wife and children. He draws a sum of Rs.2, 000/- (Rupees Two thousand only) by way of pension. He, therefore, wanted to start his business in the said shop.

An application for release of the shop was filed before the prescribed authority being Chief Judicial Magistrate, Nainital in terms of Section 21(1) (a) of *U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972*. The said application was dismissed, inter alia, on the premise that applicants on a shop other than the shop in question holding:

"However, as regards need of N.A. No. 1 for the said shop, she has no other means of her livelihood except the shop in question and it is also clear that the N.A. No.1 is an old lady of 50-50 years of age because of which she was unable to carry business elsewhere. In such a case, therefore, in relation to the applicants N.A. No.1 has intense and bonafide need of the shop in question and in case the shop in question is released in favour of the applicants undoubtedly the N.A. No.1 having no means livelihood would face too much hardship, when applicant No. 2 is a retired man and is living on pension and he is still young and he has a shop adjoining the shop in question and he can carry his business elsewhere. In such a case therefore, in relation to applicants the N.A. No.1 has intense and genuine need of the shop in question and the relative hardship is very much in favour of the non applicant's No. 1 and against the applicants."

4. The Appellate Authority, however, reversed the said order holding that respondent No.3 was in bona fide need of the said shop for the purposes of carrying out an independent business. As regards comparative hardship, it was opined that Rule 16 of the Rules framed in terms of Section 41 of the Act 13 of 1972 would not be a ground for refusing to allow a release application. The writ petition filed by the appellant thereagainst as indicated hereinbefore has been dismissed by the High Court by reason of the impugned judgment.

5. The High Court, we may at the outset notice, has committed an error in holding that the findings of both the prescribed authority as also the Appellate Authority were concurrent; in fact the Appellate Authority reversed the findings of the prescribed authority.

6. Mr. R.P. Gupta, learned counsel appearing on behalf of the appellant would submit:

“i) The High Court and the courts below have failed to take into consideration the scope and purport of the 4th proviso appended to Section 21(1)(a) of the Act vis-`-vis Rule 16 of the Rules.

ii) While considering the question of comparative hardship, the appellate court as also the High Court should have made an attempt to balance the requirements of both the landlord and tenant by directing division of the tenanted premises into two, which measures 30 ft. x 20 ft.

(iii) The fact that the husband of the petitioner was the tenant in the shop in question for a long time, viz., for more than 50 years, is itself a pointer to show that Rule 16 of the Rules would be applicable.”

7. Mr. Sanjay Parikh, learned counsel appearing on behalf of the respondents on the other hand supported the impugned judgment.

8. Section 21(1)(a) of the Act reads as under:-

"21. Proceedings for release of building under occupation of tenant.- (1) The prescribed authority may, on an application of the landlord in that behalf, order the eviction of a tenant from the building under tenancy or any specified part thereof if it is satisfied that any of the following grounds exists namely--

(a) That the building is bona fide required either in its existing form or after demolition and new construction by the landlord for occupation by himself or any member of his family, or any person for whose benefit it is held by him, either for residential purposes or for purposes of any profession, trade or calling, or where the landlord is the trustee of a public charitable trust, for the objects of the trust;"

The fourth proviso appended thereto reads as under:

"Provided also that the prescribed authority shall, except in cases provided for in the Explanation, take into account the likely hardship to the tenant from the grant of the application as against the likely hardship to the landlord from the refusal of the application and for that purpose shall have regard to such factors as may be prescribed."

Section 41 of the Act 13 of 1972 provides for the rule making power. Pursuant thereto or in furtherance thereof Rules have been framed by the State of U.P. known as U.P. *Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972* (for short, "the Rules").

Rule 16(2) of the Rules reads as under:

"16. Application for release on the ground of personal requirement -

(1).....

(2) While considering an application for release under clause (a) of Sub-section (1) of Section 21 in respect of a building let out for purposes of any business, the Prescribed Authority shall also have regard to such facts as the following:-

(a) The greater the period since when the tenant opposite party, or the original tenant whose heir the opposite party is, has been carrying on his business in that building, the less the justification for allowing the application;

(b) Where the tenant has available with him suitable accommodation to which he can shift his business without substantial loss there shall be greater justification for allowing the application.

(c) The greater the existing business of the landlord's own, apart from the business proposed to be set up in the leased premises, the less the justification for allowing the application, and even if an application is allowed in such a case, the prescribed

authority may on the application of the tenant impose the condition where the landlord has available with him other accommodation (whether subject to the Act or not) which is not suitable for his own proposed business but may serve the purpose of the tenant, that the landlord shall let out that accommodation to the tenant on a fair rent to be fixed by the prescribed authority;

(d) Where a son or unmarried or widowed or divorced or judicially separated daughter of a male lineal descendant of the landlord has, after the building was originally let out, completed his or her technical education and is not employed in Government service, and wants to engage in self employment, his or her need shall be given due consideration."

9. Application of the aforementioned provisions to the fact of this case is in question. Bona fide requirement of the shop premises has been found in favour of respondent No.3 - Sunil Kumar. It now almost stands admitted that Shri Anil Kumar resides and runs a business at Almora. It is also beyond any doubt that Shri Sunil Kumar resides at Nainital. The fact that he is a retired person is not in dispute. He receives a sum of Rs. 2,000/- by way of pension has also not been disputed. The Appellate Authority has found existence of bona fide requirement on the part of the said Shri Sunil Kumar as indicated hereinbefore. The contention of the appellant No.1 is that she is a 76 years old lady and that she has to run the said business as of necessity. The core question is whether the Appellate Authority was wholly wrong in arriving at the said finding so as to warrant interference by the Writ Court.

10. Before the Prescribed Authority, no plea was taken by the appellants that another shop was available to the respondent No.3. The Prescribed Authority, on the basis of a purported statement made by the sister of the respondent Nos. 2 and 3, arrived at a purported finding that ground-floor of one building, commonly known as, "Durga Cottage" is available. The Appellate Authority, however, upon consideration of the entire materials on record arrived at a different conclusion opining that the respondent No. 3 has been living with his wife and children independently and having regard to the fact that admittedly he has been receiving a petty sum of Rs.2, 000/- by way of pension wherewith it was not possible to maintain a family of 4-5 members, he must augment his source of income. It was also found that one of his sons had been studying in Nainital. No evidence was brought on record to show that he has any property other than the one where the shop in question is situated. Respondent No. 3 was found to have been residing in a portion of first floor of the property and the disputed shop was situated in the ground-floor and on the said premise it was held that it was not possible to ask him to open a shop at the first-floor by giving up his residential accommodation.

11. It is not the case of the appellant that the `Durga Cottage" is situated at any other place or it is another property where the respondent No. 3 has a share and whereat, he can start running a shop. The aforementioned finding of the Appellate Authority was not challenged before the High Court. An error committed by the Prescribed Authority as regards availability of an alternative accommodation to the respondent No.3 was corrected by the Appellate Authority and, thus, in the event, the appellant intended to question the correctness

thereof, a specific ground in the writ petition should have been taken. Even it does not appear from the special leave petition that such a ground has been raised even before us. In the absence of any ground, thus, having been taken either before the High Court or before us that the aforementioned finding of the Appellant Authority must be held to be containing an error of record, and thus, we are of the opinion that the said finding of fact should not be interfered with.

We may now consider the submission of Mr. Gupta, learned counsel for the appellant, that the size of the shop being 13 ft. x 20 ft. can be divided into two shops so as to accommodate both the 1st appellant as also the 3rd respondent. It appears that there exists a dispute in regard thereto. Respondents in their affidavit categorically stated:

"That it may also be pointed out that the present Respondent filed an application for release of the disputed accommodation situated at Nainital which is a small shop measuring 8 feet x 10 feet and is not capable of being partitioned."

12. The said averments have been traversed in paragraph 8 of the rejoinder in the following terms:

"That the contents of para 3 of counter affidavit of respondents are wrong and denied and the respective contents of petition are reiterated."

13. We are, however, not oblivious of the fact that with the said rejoinder a sketch map has been annexed to show that it measured 13 ft. x 20 ft. We are, however, of the opinion that such disputed questions of fact cannot be gone into by this Court for the first time.

"Comparative hardship, indisputably, is a relevant factor for determining the question as to whether the requirement of the landlord is bona fide or not within the meaning of the provisions of the said Act and the Rules. It is essentially a question of fact. Such a question of fact, however, is to be determined on the touchstone of the statutory provisions as contained in Section 21(1)(a) and Rules 16(2)(c) of the Rules."

14. Rule 16 provides for some factors which are required to be taken into consideration for the purpose of determining the comparative hardship. Respondent No. 3 in this case does not have any business. If he has no business, the question of application of the factors as envisaged in the first part of clause (c) of Sub-Rule (2) of Rule 16 will not arise. On the findings of the Appellate Authority, no accommodation is available with him. The question of thus any premises being let out in favour of 1st appellant also does not arise.

15. There is also nothing on record to show that for the last so many years the appellant had made any effort to find out a tenanted premises for herself so that she can continue with her business. No such material at least has been brought on record. Any subsequent event as regards thereto has neither been pleaded nor proved.

“The provisions of the statutory rules must be interpreted so as to give effect to the object and purport of the Act. It cannot be applied in a vacuum, as the statute requires comparison of the hardship of both the tenant as also the landlord. It is, therefore, not a case where Rule 16 has any application.”

16. The court would not determine a question only on the basis of sympathy or sentiment. *Stricto sensu* equity as such may not have any role to play.

17. In *Bhagwan Das vs. Jiley Kaur*¹, this Court distinguishing the earlier decision of this Court in *Bishan Chand vs. Vth Addl. District Judge, Bulandshahr*² stated the law in the following terms:

"It was also pointed out in this case that the provisions of Rule 16(2) of the Act (sic for Rules) had not been considered at all. In our opinion, the said decision is clearly distinguishable. Firstly, the instant case was one where there was an outweighing circumstance in favour of the landlord namely that two of her sons after completing their education were unemployed and wanted to carry on business for self-employment. Secondly, as already seen above, it was not a case where the provisions of Rule 16(2) can be said to have been ignored by the District Judge. Thirdly, it was a case where there was even this additional circumstance that the appellant had brought no material on record to indicate that at any time during the pendency of this long drawn out litigation he made any attempt to seek an alternative accommodation and was unable to get it."

The `thirdly' referred to therein apply to the fact of this case.

Yet again in *Rishi Kumar Govil vs. Maqsoodan & ors.*³ (wherein one of us Panta, J. was a Member), this Court quoted from the decision from *Sushila vs. IInd ADJ*⁴, wherein it was stated:

"11. In the case in hand we find that even though the period of tenancy of the respondent is no doubt long but availability of another shop to him where he can very well shift his business as found by the prescribed authority, neutralizes the factor of length of tenancy in the accommodation in dispute. We further find that the landlady has no other shop where she can establish her son who is married and unemployed. There is nothing on the record to indicate that the business of the father of Prem Prakash is so huge or that it is a very flourishing business so as to attract application of clause (c) of Rule 16(2). As observed earlier it is clear that the length of the period of tenancy as provided under clause (a) of sub-rule (2) of Rule 16 of the Rules, 1972 is only one of the factors to be taken into account in context with other facts and circumstances of the case. It cannot be a sole criterion or deciding factor to order or not the eviction of the tenant. Considering the facts in the light of Rule 16 pressed into service on behalf of the respondent, we find that according to the guidelines provided therein balance tilts in favour of the unemployed son of the landlady whose

need is certainly bona fide and has also been so accepted by the respondent before us."

We may notice that recently in *Satyawati Sharma (Dead) by LRs. Vs. Union of India (UOI) and Anr.*⁵. Section 14(1)(e) of the *Delhi Rent Control Act, 1958* was declared ultra vires stating that with the passage of time a statute which was held to be valid may be held to be invalid in the following terms:

"It is trite to say that legislation which may be quite reasonable and rationale at the time of its enactment may with the lapse of time and/or due to change of circumstances become arbitrary, unreasonable and violative of the doctrine of equity and even if the validity of such legislation may have been upheld at a given point of time, the Court may, in subsequent litigation, strike down the same if it is found that the rationale of classification has become non-existent."

18. Appellant No.1 is said to be 76 years old. Her daughters are married. Learned counsel submits that she should be allowed at least five years' time to shift at a different place. We do not think that having regard to the fact that the suit was filed in 2003, she should be given that much time.

19. In the facts and circumstances of this case, we are of the opinion that six months' time should be granted to the 1st respondent to vacate the premises, which should serve the ends of justice. It is directed accordingly. Subject to the aforementioned directions, this appeal is dismissed. In the facts and circumstances of this case, there shall be no order as to costs.

¹[1991 Supp. (2) SCC 300]

²[(1982) 1 SCC 626]

³[(2007) 4 SCC 465]

⁴[(2003) 2 SCC 28]

⁵2008 (6) SCALE 325